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No. 8, Original

IN THE

Supreme Court of the United States

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, *et al.*

MEMORANDUM OF THE QUECHAN INDIAN TRIBE IN REPLY TO THE EXCEPTIONS OF THE STATE PARTIES

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MEMORANDUM OF THE QUECHAN INDIAN TRIBE IN REPLY TO THE EXCEPTIONS OF THE STATE PARTIES

1. INTRODUCTION.

The State Parties have objected to a portion of the Report of Special Master McGarr (dated July 28, 1999) (hereafter "McGarr Rep."). That portion rejected their contention that since no water rights claim was made for certain Quechan tribal boundary lands within the Fort Yuma Indian Reservation by the United States in *Arizona v. California*, 373 U.S. 546 (1963) (*Arizona I*), those claims are therefore barred by certain principles applied by this Court. *Arizona v. California*, 460 U.S. 605 (1983) (*Arizona II*). For the reasons discussed below, the State Parties' exception should not be sustained.

2. BACKGROUND.

At one time, all parties here, including the State Parties, sought adjudication of the disputed boundaries of the Fort Yuma Indian Reservation. Now the State Parties seek to foreclose that possibility to gain advantage in water allocation. The key legal events in this controversy make it clear that the State Parties' exceptions are unfounded. This Court has made it clear that Article II of the original decree, involving quantification of water rights, can be modified under this Court's continuing jurisdiction. The Court has also made it clear that its 1979 supplemental decree "left open the issues about the boundaries of the other reservations." *Arizona II*, 460 U.S. at 634. This Court also ruled that the question of boundary lands on the Fort Yuma Indian

Reservation was preserved in the 1979 supplemental decree. Thus, at the risk of belaboring the somewhat complicated chronology of this case, we review the salient signposts.

1952: Arizona filed the original complaint with the Court. The United States intervened and asserted water rights for the Quechan Tribe and the Fort Yuma Indian Reservation. It did not claim water rights for certain "disputed boundary" lands based on a 1936 Interior Solicitor's opinion[1] that such lands had been conveyed away by the Tribe in an 1893 agreement.[2] Bound by the 1936 Solicitor's Opinion, the United States did not assert any claims based on the lands now in question.

1964: The Court issued a decree reserving certain boundary issues for further determination on the Fort Mojave and Colorado River Reservations. *Arizona v. California*, 376 U.S. 340, 344 (1964).

1978: On December 20, 1978, Interior Solicitor Krulitz issued an opinion[3] holding that the earlier cessions of lands by the tribes in the 1893 Agreement with the United States never became effective because conditions of that agreement had not occurred. 86 I.D. 3 (1978). That same day, the

1. Solicitors Op. M-28198 (Jan. 8, 1936); *see also Hearings on Oversight on Quechan Land Issue Before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs*, 94th Cong., 2d Sess. 69 (1976).

2. Agreement of Dec. 4, 1893 (reprinted in the Act of Aug. 15, 1894, ch. 290, 28 Stat. 286) (1893 Agreement).

3. Dept. of the Interior, Opinion of the Solicitor, No. M-36908 (Dec. 20, 1978), 86 Interior Dec. 3 (1978).

Secretary of the Interior issued an order revising the boundaries of the Fort Yuma Indian Reservation to recognize the holding of the Krulitz opinion. *Arizona v. California*, 460 U.S. at 632-633; *see also Quechan Indian Reservation Boundaries*, 46 Fed. Reg. 11372 (1981).

1978: On December 22, 1978, the United States moved in this case to modify the 1964 decree to obtain water rights for certain tribal "boundary" lands and "omitted" lands. The United States noted that final boundary determinations had been mentioned by this Court specifically only for the Colorado River and Fort Mojave Reservations. However, it argued that the fundamental equitable principles involved should require that the same rules apply to other reservations whose boundaries have finally been determined to include land not known to be encompassed in 1964. The State Parties essentially agreed with the United States' view, responding that there had been no final determination of any of the various boundary disputes and asking the Court to address them. *See* Exception by State Parties to Report of Special Master and Supporting Brief at 20, *Arizona v. California*, No. 8, Original (Dec. 20, 1999) (hereafter State Parties' Excp.).

1979: On January 9, 1979, the Court held that quantities of water in the original decree would continue to be subject to appropriate adjustment by agreement or decree of the Court "in the event that the boundaries of the respective Reservations are finally determined." *Arizona v. California*, 439 U.S. 419, 421 (1979) (supplemental decree).

1982: On February 22, 1982, Special Master Elbert T. Tuttle issued a final report that concluded that the 1978 Solicitor's Opinion concerning Quechan lands was a final

determination. Special Master Tuttle determined that additional water was due to the Quechan Tribe because of this additional land within the Fort Yuma Indian Reservation.

1983: This Court rejected Special Master Tuttle's view of the secretarial order. The Court ruled that the 1979 supplemental decree did not resolve the boundary disputes but left open the relevant articles of the original decree concerning quantities of water, not only for the Colorado River and Fort Mojave Reservations but also as to "issues about the boundaries of the other reservations." *Arizona II*, 460 U.S. at 634. The Court noted that "if at all possible, the boundary disputes would be settled in other forums." *Id.* at 638. A case concerning these matters had been filed in 1981 but was ultimately dismissed for lack of jurisdiction. *Metropolitan Water Dist. v. United States*, 830 F.2d 139 (9th Cir. 1987).

1984: A supplemental decree by the Court specifically revised Article II(D)(5) to provide that quantities for the Fort Yuma and other Indian reservations would be subject to appropriate adjustments by decree of the Court "in the event that the boundaries of the respective reservations are finally determined." *Arizona v. California*, 466 U.S. 144, 145 (1984).

1987: The Ninth Circuit Court of Appeals dismissed the case brought by Metropolitan Water District to determine boundary lands on the grounds of lack of jurisdiction. *Metropolitan Water Dist. v. United States*, 830 F.2d 139 (9th Cir. 1987). This Court affirmed the Ninth Circuit on a split vote. *California v. United States*, 490 U.S. 920 (1989).

1989: On July 19, 1989, the State Parties moved to reopen the decree to determine the disputed boundaries on the Fort Yuma Indian Reservation and others.

3. ARGUMENT

3.1 The Status of The Quechan Tribe's Lands Has Never Been Litigated. The Court's "Omitted" Lands Decision Does Not Apply.

The State Parties first argue that the determination of boundaries of the Fort Yuma Indian Reservation is bound by this Court's "strong interest in finality." State Parties' Excp. at 19 (citing *Arizona II*, 460 U.S. at 620, dealing with the so-called "omitted lands."). They further argue that the United States "could have" raised boundary land claims on behalf of the Quechan Tribe at earlier stages of this litigation. *Id.* at 20. They also contend that representation made by the United States concerning the limits of its claims regarding "omitted lands" should also be "read as a limitation on its claims as to the boundaries of each reservation." *Id.* These views are legally incorrect.

This case does not involve "omitted" lands. The historical background and procedural context of the so-called "omitted lands" issue in *Arizona II* is markedly different from the background and context of the issue of the disputed boundary lands involved here. Footnote 14 in *Arizona II* is critically important to an understanding of the Court's rejection of the United States' and the Tribes claim for omitted lands. The United States had earlier, as indicated in footnote 14, acknowledged to Special Master Rifkin that there were additional lands *within reservations* for which the United States was not seeking a water allocation and would not offer proof of irrigable acreage:

> Master Rifkin then inquired: "And although there may be other irrigable lands within those reservations, those you do not lay any claim for the service of water upon?" Mr. Warner replied: "That is correct," and Master Rifkin noted: "that is the way we are going to be bound. This is a statement that I will take seriously."

Arizona II, 460 U.S. at 622 n.14 (quoting Tr. of Arg. before Special Master Rifkin, 14, 154-14, 157). Thus, finality principles were applied to a later claim of "omitted" irrigable acreage where counsel for the United States had previously made known to the Court that he was aware of lands *within reservations* for which they would choose not make a claim for water allocation. *Arizona II*, 460 U.S. at 628. This present case, however, involves no such "known but omitted" lands. Rather, it deals with lands that were presumed, at the time the United States made the statements noted above, to be outside the Reservation and thus not within the subject matter of the case.

Rather than foreclose adjudication of all relevant claims, Article IX of the 1964 Decree provides:

> Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

Arizona v. California, 376 U.S. 340, 353 (1964). Article IX was included in the recommended decree as an agreed-upon

provision. *Arizona II*, 460 U.S. at 622 (citing Rifkin Rep. at 360). In Article IX, the Court retained the "power to correct certain errors, to determine reserved questions, and, if necessary, to make modifications in the decree." *Id.* at 618. Thus, the State Parties' views on finality do not coincide with the rulings in this case. The Court has made it clear that it has retained jurisdiction to consider modification of the decree or any supplemental decree. *Arizona II*, 460 U.S. at 618.

Because of the unique nature of this original jurisdiction case, Article IX alters application of res judicata and other finality principles. When the United States and the tribes claimed that practicably irrigable acreage located within reservation boundaries was omitted from the calculations of Special Master Simon Rifkin, this Court stated that there was no question "that if these claims were presented in a different proceeding, a court would be without power to reopen the matter due to the operation of res judicata." *Arizona II*, 460 U.S. at 617. However, in the context of this proceeding the Court disagreed with the Special Master concerning application of law of the case, stating:

> To extrapolate wholesale law of the case into the situation of our original jurisdiction, *where jurisdiction to accommodate changed circumstances is often retained*, would weaken to an intolerable extent the finality of our decrees in original actions, particularly a case such as this turning on statutory rather than Court-fashioned equitable criteria.

Arizona II, 460 U.S. at 619 (emphasis added; footnote omitted).

After reviewing certain fundamental principles of finality, the Court concluded that Article IX did not "contemplate a departure from these fundamental principles so as to permit retrial of factual or legal issues that were *fully and fairly litigated 20 years ago*." *Arizona II*, 460 U.S. at 621 (emphasis added). Accordingly, the Court expressly held, that while Article IX is subject to the general principles of finality and repose, this is so only in the absence of changed circumstances or unforseen issues not previously litigated. *Id.* at 619. The obvious point here is that the boundary of the Fort Yuma Indian Reservation has never been litigated at all.

The Court specifically preserved this issue in a proviso in the 1979 supplemental decree, which states as follows:

> [P]rovided that the quantities fixed in paragraphs (1) through (5) of Art. II(D) of said [1964] Decree shall continue to be subject to appropriate adjustment *by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined.*

Arizona v. California, 439 U.S. 419, 421 (emphasis added).

The Court's subsequent opinions confirm this reading. In another proviso in the Court's decree of April 16, 1984, the Court again reserved the disputed boundary land question:

> [P]rovided that the quantities fixed in this paragraph [Fort Mojave], and in paragraphs 1, 2, 3, and 4 [the other four reservations] shall be subject to appropriate adjustments by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined.

Arizona v. California, 466 U.S. 144, 145 (1984).

As we have discussed above, this Court's decision in *Arizona II* rejects the "omitted lands" claims on finality principles. This rejection rests on a fundamentally different ground than does the United States' and Tribe's request for seeking additional water allocation for the disputed boundary lands. The *Arizona II* decision on the "omitted lands" in no way puts the Tribe and the United States on notice as to the possible application of those principles with respect to the disputed boundary lands claim.[4]

Further, it is difficult to understand how the United States could have raised the disputed boundary claims in its request to the Court in 1964, since the official position of the United States Government at the time was that there was no dispute. Their position in 1964 was based on the 1936 Solicitor's Opinion, which concluded that the lands in question were not within the boundaries of the Fort Yuma Indian Reservation. The United States was bound to take a litigation position legally consistent with its internal determinations. The Special Master noted that the United States necessarily

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4. The third argument made by the State Parties, that the tribes or the United States have not made any expenditures for irrigation facilities on the disputed boundary lands in anticipation of a successful outcome, State Parties' Excp. at 26, is simply specious in light of the years of uncertainty surrounding the status of the disputed boundary lands. As this Court has noted, water allocation to the tribes have been "limited to the irrigable lands within the reservation boundaries as the Master had determined them to be." *Arizona II*, 460 U.S. at 637.

relied on the 1936 Solicitor's Opinion as the basis for determining which lands were within the boundaries of the Fort Yuma Reservation. Order No. 4 at 6 (Sept. 6, 1991). Indeed, the Special Master points out that the United States "had no other option." *Id.*

In 1974, after extensive analysis and consultation, Solicitor Krulitz reversed the 1936 Opinion and concluded that the conditions in the 1893 Agreement had never been satisfied and thus the boundary lands had not been ceded and remained within the Reservation. Just as Solicitor Margold's 1936 opinion was binding on the Department of the Interior at the time, so is Solicitor Krulitz's opinion today. The Special Master correctly understood that this change in the legal status of the 1893 Agreement by the Interior Department is more than a change of legal theory by the Justice Department. *Cf.* State Parties' Excp. at 26. And, it is fundamentally different than a new claim for irrigable lands, which were always known to have been within the Reservation boundaries, and for which the claim was arguably relinquished on the record. Neither the United States nor the Quechan Tribe ever relinquished claims to the boundary lands.

3.2 The State Parties' Preclusion Argument Is Untimely And Is Waived.

The State Parties admit openly that they did not "raise a preclusion defense in their opposition to the United States' and the Tribes' 1978 motion to open the 1964 Decree." State Parties' Excp. at 25. Given the State Parties' failure to raise the res judicata defense in *Arizona II*, their eleventh-hour assertion of it before Special Master McGarr renders it untimely.

Moreover, the State Parties have waived the ability to raise this defense. The State Parties seek to excuse their failure to timely raise their res judicata arguments with the assertion that this Court "could have" raised the preclusion defense sua sponte in response to the Tribe's 1978 motion to open the 1964 Decree.[5] *Cf.* State Parties' Excp. at 25. Whatever this Court "could have" done does not excuse the State Parties' failure in fact to make this argument.

Cases cited in support of the State Parties' nonwaiver argument acknowledge a split in the circuits on whether a res judicata argument can be made long after the litigation is underway. The State Parties cite a concurring opinion in *Nixon v. United States*, 978 F.2d 1269, 1297 (D.C. Cir. 1992) (cited in State Parties' Excp. at 25). But *Nixon* was not resolved by application of res judicata, and the concurring justice simply notes the split in the circuits regarding an appellate court's ability to raise res judicata sua sponte. The question of whether the court could do so in the situation before it was an open question. *Id.* at 1297 (Henderson, J., concurring).

Nor does the State Parties' citation of *Armstrong v. Norwest Bank*, 964 F.2d 797 (8th Cir. 1992), assist them. *Armstrong* was an action in bankruptcy. The Eighth Circuit held that Armstrong, the trustee for the bankruptcy estate of Trout, was bound by stipulations that Trout had entered into

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5. The State Parties argue that, in determining waiver, the "decisive" factors should be (1) whether the United States and the Tribe had a full and fair opportunity to litigate the preclusion issue before Special Master McGarr, and (2) whether the State Parties' failure to raise the defense of res judicata in *Arizona II* somehow prejudiced the Tribe. State Parties' Excp. at 25. This is not the standard.

with a creditor and upon which the court had held hearings. *See id.* at 800-01. The Eighth Circuit held that the doctrine of res judicata bars only the trustee's claims that were raised after a subsequent decision of the bankruptcy court. *Id.* at 802.

The State Parties also cite the Court's decision in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 231 (1995) (holding that Congress' statutory direction to reopen final judgment in a whole class of cases violates separation of powers doctrine). There has been no congressional directive to open final decisions here. Indeed, there is no serious contention that the Quechan boundary lands question has *ever* been finally adjudicated. *See Arizona v. California*, 466 U.S. 144, 145 (1984) (quoted in State Parties' Excp. at 24). *Plaut* is inapposite.

It does not assist the State Parties that the Court could have raised the defense sua sponte. Indeed, the State Parties' argument concerning the Court's ability to raise spontaneously the preclusion defense cuts against them. If a court may raise res judicata sua sponte where it regards "the desirability of avoiding duplicative litigation is sufficiently compelling," *id.* at 25 (quoting *Lesher v. Lavrich*, 784 F.2d 193, 195 (6th Cir. 1986)), the fact that the Court did not do so here is also compelling, particularly since, there is *no* duplicative litigation here.

Attempts to actually litigate the Fort Yuma Reservation boundaries have been unsuccessful. Although this Court spoke approvingly of a suit filed in the district court to fully litigate the boundary issues, that action was ultimately dismissed on jurisdictional grounds. *Metropolitan Water Dist. v. United States*, 830 F.2d 139 (9th Cir. 1987). The

decision was affirmed by an equally divided court. *California v. United States*, 490 U.S. 920 (1989). Thus, the underlying rationale of a preclusion defense, such as that raised by the State Parties here, is missing.

By citing *Lesher*, the State Parties continue to ignore that there has been no adjudication of the disputed boundary lands, and that the State Parties themselves had sought adjudication of the issue. *E.g., Arizona II*, 460 U.S. at 637 ("Indeed, all of the parties treated the boundary matters as fully adjudicable issues of material fact or law."); *see also id.* at 638. The basis for refusal to find a waiver is predicated on the need to avoid duplicative litigation. In *Lesher*, the preclusion of the federal claim was based on the parties having litigated the constitutional issue to the state supreme court. *See generally Lesher v. Lavrich*, 784 F.2d 193 (6th Cir. 1986). Here there has been no litigated determination of the boundary issue.

As noted above, the State Parties admit that they did not timely raise a preclusion defense in 1978. State Parties' Excp. at 25. Indeed, in 1982 the State Parties argued that Special Master Tuttle erred by *not* adjudicating the boundary issues. *Arizona II*, 460 U.S. at 638. Now they argue it would be error *to* adjudicate those issues. The State Parties, and this Court, have long been aware of the 1978 Solicitor's Opinion; indeed, the opinion was the basis for the United States' 1978 motion to open the 1964 Decree. The State Parties have waived any right to raise this defense now.

3.3 The Solicitor's Opinion Affirming Quechan Ownership of Disputed Lands Is a Changed Circumstance Negating a Preclusion Defense.

Lastly, the State Parties complain that the Special Master wrongly barred their preclusion defense by treating the 1978 Krulitz Opinion as a "new fact" or "unknown circumstance" barring use of res judicata to defeat the Tribe's claim. State Parties' Excp. at 26. In Order No. 4 (Sept. 6, 1991), the Special Master rejected this argument, finding that the 1978 opinion *was* a changed circumstance that bars application of preclusion principles.[6] Order No. 4 at 6-7.

The State Parties argue that the 1978 Solicitor's Opinion, which included the contested lands within the Reservation boundary, was not an "unknown circumstance" that arose after the United States made claims for the Quechan Tribe. State Parties' Excp. at 26-27. They do not explain how the Justice Department, presenting claims on behalf of Quechan in 1964, could have known about a Solicitor's opinion that would not be issued until 14 years later.

The law recognizes that in certain circumstances judicial decisions rendered subsequent to the prior litigation may constitute such changed circumstances as to prevent an estoppel. *E.g., Comm'r of Internal Revenue v. Sunnen*, 333 U.S. 591 (1948). The Special Master correctly concluded that the 1978 Solicitor's Opinion was such a changed

6. We note that, with respect to the Special Master's conclusion that the 1983 settlement bars the Quechan Tribe from seeking an additional allocation of water for the disputed lands is generally governed by principles of collateral estoppel. With respect to whether the 1964 Decree bars the claim, the more appropriate set of preclusion principles are those relating to res judicata.

circumstance and that the Quechan Tribe was not precluded from asserting water rights based on the disputed boundary lands claims here, even though the United States initially did not include those claims in 1964. Order No. 4. at 6-7. Further, as the Special Master notes, the Justice Department had no choice but to conform its position with the Solicitor's conclusions. *Id.* at 6.

The State Parties' sole contention with respect to the Special Master's characterization of the 1978 Solicitor's Opinion as an unforeseeable unknown circumstance is that "it is hornbook law that a different legal theory with the same factual basis will usually be barred." State Parties' Excp. at 27. This statement ignores the character of the 1978 Solicitor's Opinion and its effect on the Justice Department. The determination of which lands lie within the Fort Yuma Indian Reservation is fundamentally different from deciding which Reservation lands the United States would put forward proof of "practicably irrigable acreage." *See Arizona II*, 460 U.S. at 622 n.14. As the Special Master noted, the 1978 Solicitor's Opinion is a binding, official construction of the 1893 Agreement and the facts surrounding whether the conditions of that agreement were met. Not in existence in 1964, the 1978 Solicitor's Opinion correctly served as an independent basis for the United States' motion to reopen the decree in 1978. The United States did not have the option in 1964 (nor now) of taking a litigation position contrary to that of the Solicitor. *See* Order No. 4 at 6.

Thus, the 1978 Solicitor's Opinion is correctly considered an unforeseen circumstance barring application of res judicata. *See* WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE (3d ed.) at § 131.22. Simply alleging new facts in support of claims asserted in a prior

action will usually not avoid application of res judicata but, "if such facts *in themselves* establish independent grounds for a claim against the defendants in the previous action, claim preclusion does not apply, even if the new claims are based on the same legal theories or seek the same damages as the prior action." MOORE'S FEDERAL PRACTICE, § 131.21(1) (emphasis in original). Such is the case here.

The State Parties are not prejudiced in any way by this construction because the 1964 and 1979 decrees anticipate judicial resolution of the disputed boundary lands. Indeed, the State Parties themselves sought this resolution in the *Metropolitan Water District* litigation. *See generally Metropolitan Water Dist. v. United States*, 830 F.2d 139 (9th Cir. 1987), *aff'd sub nom. California v. United States*, 490 U.S. 920 (1989). Adjudicated and final resolution of this long-standing issue is all the Tribe seeks here.

4. CONCLUSION.

The Court refused to rule on the nature, extent, and irrigability of the Quechan disputed boundary lands in *Arizona II* because it set aside Special Master Tuttle's findings that the 1978 secretarial order constituted a final determination of the status of the boundary lands. That status remains undetermined after years of litigation. The State Parties now contend that, because the United States did not initially seek an allocation of water for the disputed boundary lands, the Tribe's current claim should be barred, just as the United States' deliberate decision on the record to not seek an allocation based on practicably irrigable acreage acknowledged to be *within* the Reservation boundaries barred a subsequent claim based on that acreage. The Special Master correctly rejected this contention, and this Court should do so as well.

The just and only practical way to resolve the long-standing uncertainty concerning the Quechan boundary lands is to remand the matter to the Special Master for adjudication on the merits of the Quechan Tribe's claim to the disputed lands and a corrected water allocation to serve the practicably irrigable acreage within those lands.

Respectfully submitted,

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